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10/29/2015
U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE TOWN OF OYSTER BAY et al,
Defendants.

Docket 14-cv-02317-ADS-SIL

United States Courthouse
Central Islip, New York

March 19, 2015
12:02:48 pm to 12:18:14 pm

TRANSCRIPT FOR CIVIL CAUSE

INITIAL CONFERENCE

BEFORE THE HONORABLE STEVEN I. LOCKE

UNITED STATES MAGISTRATE-JUDGE

A P P E A R A N C E S :

For Plaintiff:

MICHAEL J. GOLDBERGER, ESQ.
United States Attorneys' Office
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201-1820
(718)254-6052; (718)254-6083 fax
Michael.Goldberger@usdoj.gov

For Plaintiff:

THOMAS A. MCFARLAND, ESQ.
United States Attorneys' Office
Eastern District of New York
610 Federal Plaza
Central Islip, New York 11722
(631) 715-7863; (631) 715-7920 fax
thomas.mcfarland@usdoj.gov

For Defendant, Town of Oyster Bay and John Venditto:

ANTHONY HERMAN, ESQ.
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
(202) 662-6000; (202) 662-6291 fax
aherman@cov.com

A P P E A R A N C E S :

For Defendant, Town of Oyster Bay and John Venditto:

BRETT C. REYNOLDS ESQ.
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001-4956
(202) 662-6000; (202) 662-6291 fax
breynolds@cov.com

Transcriber:

AA Express Transcripts
195 Willoughby Avenue, Suite 1514
Brooklyn, New York 11205
(888) 456-9716; (888) 677-6131 fax
aaexpress@court-transcripts.net

(Proceedings recorded by electronic sound recording)

COURTROOM DEPUTY: Calling case 14-cv-2317, United States of America v. The Town of Oyster Bay et al. Counsel, please state your appearance on the record.

MR. GOLDBERGER: Good morning, Your Honor. Michael Goldberger, Assistant United States Attorney, for the United States.

MR. MCFARLAND: Thomas Mcfarland, Assistant United States Attorney, for the United States.

MR. HERMAN: Good morning, Your Honor. Anthony Herman, of Covington & Burling, for the Town of Oyster Bay and John Venditto.

MR. REYNOLDS: Good morning, Your Honor. Brett Reynolds. Also of Covington & Burling, also for the Town of Oyster Bay and others.

THE COURT: Good morning. Please be seated. Before we get started, a couple of reminders. The only record we have here is the microphone. So please speak into a microphone when you address the Court. You do not need to stand to address the Court. But if you prefer to stand, please use the lectern so that you remain miked. Okay. That's it for ground rules.

We are here for a scheduling conference. Mr. Goldberger, will you be addressing the Court?

MR. GOLDBERGER: Yes, Your Honor.

THE COURT: Well, why don't you tell me a little bit about the case, please?

MR. GOLDBERGER: Sure, Your Honor. The Town of Oyster Bay has two housing programs, which it has developed. One back in the '90s and one more recently in the 2000s. Known as the Golden Age Program, in the 1990s it was started, and the Next Generation Program, which is the more recent program. Under both, the Town offers developers incentives to build additional units more so than the zoning laws ordinarily require -- or permit rather. In exchange, the developers offer some units at a lower price as affordable housing.

The Next Generation Program was geared toward individuals who were senior citizens and the -- I'm sorry. The Gold Age Program was for senior citizens, and the Next Generation Program was geared towards first time homebuyers; generally speaking, young families. Both programs have residency preferences injected into them, so that applicants for this kind of housing, although privately developed, the Town controls who gets the units. And it's through a lottery system, but the lottery has a heavy preference for Town residents.

The result of that is that virtually all of the units under both programs have gone to White Town residents, to the exclusion of African Americans. Thereby having a discriminatory impact and we believe intentionally discriminatory against African Americans in the Town, partly evidenced by the fact, as we plead in our complaint, that statistically the eligible population outside the Town of Oyster Bay is considerably more diverse and there's a larger percentage of units that would have gone to African Americans had the Town not had the residency preference. So we're challenging this under the Fair Housing Act for discriminating against African Americans. Not because of the program itself, but because of the residency preferences that are interjected into the program.

THE COURT: So, it's a disparate impact case? Or impact in the disparate treatment case?

MR. GOLDBERGER: Both, Your Honor.

THE COURT: But the evidence is apparently stronger for the disparate impact case at this point?

MR. GOLDBERGER: The evidence is certainly stronger for the disparate impact because we have done statistical analysis, and we do not believe, as we have learned during our investigation, that there's any legitimate bona fide governmental interest in having the residency preference in place.

THE COURT: Okay. And who will be speaking for the Defendants?

MR. HERMAN: Your Honor, I will, Anthony Herman.

THE COURT: Okay.

MR. HERMAN: Your Honor, in general terms, Mr. Goldberger has accurately described the two programs. The disparate impact theory is now pending before the Supreme Court, as you know. And we think that it's likely, although predicting what the Supreme Court is going to do is a hazardous enterprise; we think it's likely the Supreme Court is going to overturn that theory under the Fair Housing Act. Even if it survives, however, we think that disparate impact is a very thin read in this case.

The fact is, I think what the Government is really seeking to do is to re-engineer a town to mirror other communities, and we think that's an improper use. We think that's quintessentially racial balancing and racial engineering. And we don't think that's what the Fair Housing Act is designed to do. We're confident that the jury will see it that way. If the Supreme Court throws out the theory, then the United States is left with a disparate treatment case that this theory in search of evidence, there's virtually no evidence.

Judge Spatt pointed to a statement by Supervisor Venditto referring to "our people". That relates, by the way, only to the Next Generation Program that's for the young people of the Town. But in our view, no jury will conclude that that's a sufficient basis for racial discrimination, because after all, it is a community that does include some 15 percent of Latinos and some smaller percentage of African Americans. And obviously, Mr. Venditto is referring by "our people" to the entirety of Oyster Bay, including Latinos and African Americans and Asians for that matter who reside there.

THE COURT: Okay. So your sense is it's a -- it's not a summary judgment case at least on the disparate impact treatment claim?

MR. HERMAN: Well, we think it should be.

THE COURT: I'm not saying you're giving up your rights to summary judgment. Don't get me wrong.

MR. HERMAN: No, no. I think based on Judge Spatt's ruling, I'm optimistic that we're going to get a summary judgment decision that's favorable. My own view with respect to Judge Spatt is that it should be a summary judgment case. I don't think on the facts that have been adduced, and the facts that -- and by the way, those facts have been adduced following an extensive investigation by the United States, in which they interviewed some 20 witnesses from the Town. The Town was fully cooperative. And based on that --

THE COURT: The witnesses -- oh. So they were represented by you at the time of the investigation?

MR. HERMAN: They were not represented by us.

THE COURT: No? Okay.

MR. GOLDBERGER: They were represented by other counsel, Your Honor.

MR. HERMAN: That's right.

THE COURT: Okay. So, you have the results of whatever that was; those interviews. Okay.

MR. HERMAN: Yes. More or less.

THE COURT: Okay. In any event, based on that fact that all that the United States, despite their best efforts, could elicit was this one statement from Mr. Venditto. We think on that basis, no reasonable jury could conclude that either of these programs was intended to discriminate against African Americans.

THE COURT: Okay. I've looked at the submissions. The discovery calendar looks a little long, but I realize this could be a larger than normal case. I understand what he Government wants, approximately 20 depositions, and the Defendants don't. Okay. I'm not going to make a ruling on that right now. But what I'll do is, given the nature of this, I'll so-order the dates you provided in terms of deadlines. My practice would be to have the Government take what the depositions are allowed, meaning up to ten, and if you feel like you need more, you can certainly speak to your adversary first and say not only do we need more, but here's why. And then, Mr. Herman, you can make an educated decision about how you want to proceed. And if you can't agree, you'll send me a motion, and we'll give you a ruling.

MR. HERMAN: Thank you, Your Honor.

THE COURT: But I'd like to put it through its paces. That being said, after documentary discovery, I like to have a status conference to see if there are any issues on the horizon that we could head off without full blown motion practice. So looking at your schedule, why don't we put a status --

MR. GOLDBERGER: Your Honor, if I might?

THE COURT: Sure.

MR. GOLDBERGER: I'm sorry to interrupt. The submission that we made on February 19 --

THE COURT: Yes.

MR. GOLDBERGER: -- was premised on the conference having been a couple of weeks ago. So in fact, written discovery was supposed to have been served several days ago according to the schedule.

THE COURT: Right.

MR. GOLDBERGER: We'd like -- and Mr. Herman and I discussed this. We'd like to try to just move everything.

THE COURT: Oh, that hasn't happened?

MR. GOLDBERGER: It hasn't happened. No, Your Honor.

THE COURT: Oh, okay. Yeah. Let's -- we should get to that toot sweet. Where are you then?

MR. GOLDBERGER: Well, we would like --

THE COURT: Rule 26 disclosures have been made?

MR. GOLDBERGER: Rule 26 disclosures have been made, Your Honor.

THE COURT: Okay.

MR. GOLDBERGER: It's simply a matter I think if we could move everything a couple of weeks commensurate with the re-scheduling of the conference --

THE COURT: All right. Let's do this in order then.

Because what I was just going to do is issue a revised order. But let's see if we can agree on some dates. So you need a couple of weeks you said to get the discovery out?

MR. GOLDBERGER: I think a couple of weeks would be fine for us, Your Honor. So that we would get out the written -- well, today is the --

THE COURT: Today is the --

MR. GOLDBERGER: I've lost track of the date.

THE COURT: -- the 19th.

MR. GOLDBERGER: The 19th. So if we could have two weeks from tomorrow to get out the discovery that would be great, Judge.

THE COURT: All right. April 3. Responses, May 4. I'll give you a status conference for the third week of May.

MR. GOLDBERGER: Sure, Your Honor.

THE COURT: That's really to my deputy.

MR. GOLDBERGER: Oh, I'm sorry.

THE COURT: May 21 at 11:30. My general practice is to give you a deadline for joining new parties or amending the pleadings for some time shortly after that conference. And then we can discuss whether you think that it's necessary to extend the deadline at that time. But I've noticed in your proposed order, you had a long lead time for amendment of the pleadings. And so I'm wondering why.

MR. GOLDBERGER: I think we were just following the order of the ruling, Your Honor. I think there was no particular reason.

THE COURT: Okay.

MR. GOLDBERGER: I don't know that we have any amendment that we are anticipating to our complaint.

THE COURT: Okay.

MR. GOLDBERGER: The one issue I would raise, if I may, is that we've discussed between us the fact that there are a couple of defenses that the Defendants have asserted that they have agreed are not valid defenses.

THE COURT: Okay.

MR. GOLDBERGER: To use a loose word if I may. And we requested that the Defendants just amend their pleading to remove those defenses. And we've had some discussion about that. I don't know how far we've gotten with it, other than the response I got was we promise not to assert it.

MR. HERMAN: There are several defenses, Your Honor, that the Defendants are not going to go forward with. We've represented to the Government that we're not going to go forward with them.

THE COURT: Right.

MR. HERMAN: And if the Government wants to move to strike them, we will consent to Government.

THE COURT: Well, I would just suggest a stipulation. Literally a half a page stipulation, and you can do that if you want. I'm going to give you a deadline for amendment of the pleadings until June 5. If any of this changes or the issue is still live at the point of the next status conference, we'll raise it there. And if you need an order of some kind, we can talk about just doing that.

MR. GOLDBERGER: It would almost be easier if the Defendants just filed an amended answer. We can do it on consent and they could just delete the paragraphs.

THE COURT: If you want to do it that way, that's fine.

MR. HERMAN: We're happy to enter into a stipulation, Your Honor.

THE COURT: A one-page stipulation is fine as well. I don't want to make more out of this than it is.

MR. HERMAN: Yes.

MR. GOLDBERGER: No, no. Nor do I, Your Honor.

THE COURT: Okay. All right. Completion of fact depositions which I have here was December. I think what I would actually like to do is keep the December deadline for now, and then at the status conference or at some other time, you can raise it once the idea of more than ten depositions.

MR. GOLDBERGER: Sure.

THE COURT: You know, it's one thing to say you need more than ten depositions; it's another thing to say you need 15, as opposed to, I don't know how many more depositions we're going to need. So why don't we leave that for 12/15 for now.

MR. GOLDBERGER: Okay.

THE COURT: Experts. My guess, and particularly in cases like this; to the degree you need experts, Mr. Goldberger, you already know who your experts are.

MR. GOLDBERGER: We do, Your Honor.

THE COURT: Okay. So, I'm going to -- I like to run -- under those circumstances, I run the deadline for identification of case in chief experts coincident with the end of fact discovery. Because you don't need the extra time to look at whatever the last transcript is going to say --

MR. GOLDBERGER: That's fine, Your Honor.

THE COURT: -- before you do it. And then I'll give 45 days for identification of rebuttal experts, which will put you at February -- I'm going to say February 28.

MR. GOLDBERGER: I'm sorry. I've gotten lost, Your Honor. So we're completing the fact witness depositions on 12/15?

THE COURT: Right. That will be the same date for identification of case in chief experts and Rule 26 disclosures. And then February 28. So 45 days later, for the rebuttal experts. Is that --

MR. GOLDBERGER: That's not 45 days, Your Honor.

THE COURT: Is the 28th a Sunday?

MR. GOLDBERGER: I think that's why I was confused.

THE COURT: It's a Sunday. All right. So we're going to make it March 1.

MR. GOLDBERGER: That's three and a half months.

THE COURT: For disclosure of rebuttal experts because the 28th is a Sunday. And then I'll schedule a final pre-trial conference -- oh, no; I'm sorry. The deadline for the commencement of summary judgment motion practice. I think for Judge Spatt, you just need a pre-motion conference. I will check that.

MR. HERMAN: I think you have to file a --

THE COURT: 56 statement first?

MR. HERMAN: The 56(1).

THE COURT: Yeah. Okay.

MR. HERMAN: And you exchange them essentially. And then request the conference.

THE COURT: Okay. That actually sounds right. So why don't I -- I'll give you a little more time because I know putting that together in these cases can be a bit of a bear. Why don't we say April 1 for that deadline? And that's just for the commencement of summary judgment motion practice. What I'll do is give you a pre-trial conference date for the third week in April. And if summary judgments start, we can talk about modifying that date depending on the motion. Judge Spatt has become far more lenient in recent years in terms of getting ready for trial, even if a motion is pending.

So, what do we have, Kristen, the third week of April?

COURTROOM DEPUTY: April 21.

THE COURT: April 21 at?

(Cross-talk.)

THE COURT: At noon. We'll post an order on ECF tonight so you'll have all the dates. And I think with those dates, we're at least set for the moment, and we'll see you in May. Is there anything else we need to discuss?

MR. GOLDBERGER: I don't think so, Your Honor. I think that pretty much covers everything that we had.

MR. HERMAN: No, thank you, Your Honor.

THE COURT: All right. Thank you, all. We're concluded.

MR. GOLDBERGER: Thank you, Your Honor.

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CERTIFICATION

I, Rochelle V. Grant, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: October 22, 2015

Rochelle V. Grant
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